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SIEMENS INDUSTRY SOFTWARE INC v. KB ENGINEERING COATINGS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[SUIT NO: WA-22IP-54-09-2021]
8 APRIL 2025

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Abstract – *(i) In cases of unauthorised reproduction and use of copyrighted software, where the rightful owner commercialises its rights through royalty-bearing licenses, the appropriate measure of general damages is ascertained by reference to the licensing fees customarily levied by the claimant in lawful commercial engagements, even if direct evidence of the extent of actual use is elusive. However, the court will consider the infringer's actual utilisation, or lack thereof, and other evidentiary gaps in determining a reasonable and proportionate license fee; (ii) Additional damages, under s. 37(7) of the Copyright Act 1987, are warranted when there are elements of bad faith on the part of the infringer, even if the infringement was confined to a limited scope and the infringer subsequently took remedial measures.*

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INTELLECTUAL PROPERTY: *Copyright – Software – Unauthorised reproduction and use of software without valid license – Assessment of damages – Applicability of license fee approach – Whether rightful owner of software entitled to damages based on license fee approach – Whether there were elements of bad faith on part of infringer warranting additional damages – Principle of 'omnia praesumuntur contra spoliatroem' – Appropriate measure of general and additional damages – Copyright Act 1987, s. 37(7)*

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The plaintiff was the registered owner of the NX12 software, an advanced engineering and manufacturing software. The defendant, on the other hand, specialised in protective coatings for mechanical components. The plaintiff, upon the discovery that the defendant had unauthorised copies of the NX12 software installed on its systems, initiated legal proceedings against the latter, alleging unauthorised reproduction and use of the software without a valid license. The High Court dismissed the plaintiff's application for summary judgment. Upon appeal, the Court of Appeal overturned the High Court's decision and granted summary judgment in the plaintiff's favour. The matter was then remitted to this court for assessment of damages. The plaintiff submitted that: (i) the plaintiff was entitled to damages based on the license fee approach; (ii) the defendant's deletion of files before inspection suggested bad faith and deliberate misconduct, justifying an adverse inference against the defendant under the *omnia praesumuntur contra spoliatroem* principle; and (iii) the plaintiff sought additional damages under s. 37(7) of the Copyright Act 1987 ('Act'), arguing that the defendant's conduct was flagrant and that

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it derived a commercial benefit from the infringement. Objecting to the plaintiff's assertions, the defendant argued that: (i) the plaintiff failed to provide evidence that the NX12 software was actively used for commercial purposes by the defendant; (ii) mere possession of the software did not necessarily equate to active use or commercial benefit and, thus, the license fee approach relied upon by the plaintiff was speculative and excessive; (iii) the alleged deletion of files should not be construed as an attempt to conceal wrongdoing but rather as part of a routine data management. The defendant took corrective steps, including warning the employee responsible and implementing compliance measures, to prevent future occurrences. These actions demonstrated a lack of flagrancy, which was a key requirement for additional damages under s. 37(7) of the Act; and (iv) the plaintiff had not established deliberate or reckless infringement, nor had it shown that the defendant derived significant financial benefit from the software's presence.

Held (ordering defendant to pay plaintiff RM670,000 in damages with interest and costs of RM40,000):

(1) Having demonstrated a consistent practice of licensing their intellectual property, the circumstances of this case necessitated the application of the second limb articulated in *General Tire and Rubber Co v. Firestone Tyre And Rubber Co Ltd*, *ie*, if the plaintiff commercialises their rights *via* royalty-bearing licenses, 'the measure of damages (the defendant) must pay will be the sums which he would have paid by way of royalty if, instead of acting illegally, he had acted legally'. Accordingly, the appropriate measure of damages must be ascertained by reference to the licensing fees customarily levied by the plaintiff in lawful commercial engagements. (paras 23 & 24)

(2) The licensing fee methodology was a principled mechanism for quantifying damages in copyright disputes, particularly where direct evidence of use was elusive. Yet, two countervailing considerations loomed large. First, the plaintiff's claim presupposed comprehensive deployment of NX12's modules without substantiating the defendant's actual utilisation – a burden that, while resting on the plaintiff, encountered evidentiary gaps. Second, the defendant's insistence on non-reliance – rooted in its narrowly-defined business of protective coatings – lacked compelling evidentiary support as it failed to rebut the *prima facie* evidence of infringement. (para 28)

(3) The plaintiff was awarded a sum of RM500,000 as a reasonable license fee and RM120,000 for service costs. This reflected a judicial estimation of probable but limited use, calibrated to the defendant's niche and the evidentiary equipoise. Such an award honoured proportionality; it neither penalised the defendant for hypothetical maximal use nor absolved it of accountability for unauthorised access. (para 30)

(4) While the defendant sought to characterise its remedial measures as evidence of good faith, the troubling implications of its conduct, particularly the deletion of files prior to forensic inspection, could not be ignored. Such actions inevitably gave rise to concerns of bad faith, casting doubt on the defendant's assertion of mere oversight. The unauthorised use of the plaintiff's software constituted a grave lapse in governance, made all the more significant, given the defendant's industry and the highly specialised nature of the NX12 software. (para 34)

(5) Additional damages, under s. 37(7) of the Act, were warranted both as a punitive measure and as a deterrent against similar future infringements. However, the defendant's subsequent remedial efforts, while not wholly exculpatory, warranted consideration in assessing the appropriate quantum. The presence of bad faith elements precluded a complete absolution of liability, but the defendant's corrective steps must nonetheless be acknowledged in a fair and measured manner. The defendant possessed the financial capability to lawfully procure the NX12 software but instead chose to utilise an illicitly obtained version. This decision betrayed a deliberate disregard for copyright laws, further justifying the imposition of additional damages. (paras 35 & 36)

(6) It was appropriate to impose a financial sanction sufficient to deter future violations while duly reflecting the extent of the infringement, which, in this case, was confined to a single laptop computer. Accordingly, the plaintiff was awarded RM50,000 in additional damages, striking a careful equilibrium between the need for deterrence and the defendant's mitigating actions. (para 36)

Case(s) referred to:

Dormeuil Freres SA & Anor v. Feraglow Ltd & Anor [1990] RPC 449 ***(refd)***

General Tire & Rubber Co v. Firestone Tyre & Rubber Co [1976] RPC 197 ***(refd)***

Kohwai & Young Publication (M) Sdn Bhd v. Lembaga Pengelola Dewan Bahasa Dan Pustaka [2013] 10 CLJ 365 HC ***(refd)***

Leather Cloth Company v. Hirschfield (1865) LR 1 Eq 299 ***(refd)***

Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2) [2009] 8 CLJ 130 HC ***(refd)***

Pneumatic Tyre Co Ltd v. Puncture Proof Pneumatic Tyre Co Ltd (1899) 16 RPC 209 ***(refd)***

Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***

Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors [2013] CLJU 104; [2013] 1 LNS 104 HC ***(refd)***

Ravenscroft v. Herbert & New English Library [1980] RPC 193 ***(refd)***

Redwood Music Ltd v. Chappell & Co Ltd [1982] RPC 109 ***(refd)***

Siemens Industry Software Inc v. KB Engineering Coatings Sdn Bhd [2023] CLJU 662; [2023] 1 LNS 662 HC ***(refd)***

Siemens Industry Software Inc v. KB Engineering Coatings Sdn Bhd [2024] CLJU 3213 CA ***(refd)***
Spalding (A G) & Bros v. AW Gamage Ltd And Benetfink & Co Ltd [1915] 32 RPC 273 ***(refd)***
The United Horse-Shoe And Nail Co Ltd v. John Stewart And Co (1888) 5 RPC 260 ***(refd)***
University of London Press Ltd v. University Tutorial Press Ltd [1916] 2 Ch 601 ***(refd)***

Legislation referred to:
Copyright Act 1987, s. 37(1)(b), (c), (d), (4), (7)
Rules of Court 2012, O. 37 r. 1

For the plaintiff - Wendy Lam Mei Kuan & Wong Jia Ee; M/s V Chong W Lam
For the defendant - Rex Kuan Kai Tat; M/s Rajashree

Reported by Najib Tamby

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] Copyright law serves as the cornerstone of innovation, safeguarding the rights of creators while ensuring a balanced approach to public access to knowledge. As observed by Peterson J in *University of London Press Ltd v. University Tutorial Press Ltd* [1916] 2 Ch 601, copyright does not protect mere ideas but rather their expression, granting authors exclusive rights that foster creativity and commercial viability.

[2] This case exemplifies that principle, centering on the plaintiff's claim for damages arising from the defendant's unauthorised use of its NX12 software. The plaintiff asserts that this infringement has caused financial loss, warranting both compensatory and additional damages under s. 37(7) of the Copyright Act 1987. The Court of Appeal, in its decision dated 8 September 2023, upheld the plaintiff's appeal, entering summary judgment against the defendant and remitting the matter to this court for the assessment of damages. In undertaking this task, the court must strike a delicate balance-ensuring robust enforcement of intellectual property rights while awarding damages that are fair, proportionate, and rooted in a sound evidentiary foundation.

Background Facts

[3] The plaintiff, Siemens Industry Software Inc, is the registered copyright owner of the NX12 software, an advanced engineering and manufacturing software widely used in design, analysis, and production processes. The defendant, KB Engineering Coatings Sdn Bhd, specialises in protective coatings for mechanical components.

[4] In early 2021, the plaintiff became aware that the defendant had unauthorised copies of the NX12 software installed on its systems. Acting on this information, the plaintiff initiated legal proceedings on 8 September 2021, alleging that the defendant had engaged in unauthorised reproduction and use of the software without a valid license.

[5] On 14 March 2022, the High Court dismissed the plaintiff's application for summary judgment (see: *Siemens Industry Software Inc v. KB Engineering Coatings Sdn Bhd* [2023] CLJU 662; [2023] 1 LNS 662; [2023] MLJU 802). However, on 8 September 2023, the Court of Appeal allowed the plaintiffs appeal, overturning the High Court's decision and granting summary judgment in the plaintiff's favour (see: *Siemens Industry Software Inc v. KB Engineering Coatings Sdn Bhd* [2024] CLJU 3213; [2024] MLJU 3638).

[6] In its judgment, the Court of Appeal ruled that the defendant maintained unauthorised reproductions of the plaintiff's proprietary software within its systems. While the defendant sought to absolve itself by attributing the infringement to an individual employee's rogue actions-purportedly undertaken without corporate knowledge – the Court of Appeal resoundingly dismissed this contention. It underscored the enduring principle of vicarious liability, affirming that entities bear responsibility for infringements perpetrated by employees acting within the ambit of their employment. The Court of Appeal further cast a discerning eye upon the defendant's decision to purge the illicit software from its devices, deeming such conduct not merely negligent but indicative of a calculated effort to obscure wrongdoing. This act, the court observed, starkly undermined the defendant's assertions of good faith. It is, with these findings, that the Court of Appeal awarded the plaintiff the following entitlement towards damages:

> (4) Ganti rugi bagi kerugian dan kehilangan yang dialami oleh Perayu akibat perlanggaran hakcipta selaras dengan Seksyen 37(1)(b) Akta Hak Cipta 1987 ditaksirkan oleh Mahkamah Tinggi;
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> (5) Gantirugi tambahan di selaras dengan seksyen 37(7) Akta Hakcipta 1987 ditaksirkan oleh Mahkamah Tinggi;

[7] On 18 November 2024, following an assessment of damages pursuant to O. 37 r. 1 of the Rules of Court 2012, this court has granted a total sum of RM670,000, together with assessment costs of RM4,000, in favour of the plaintiff. The court's decision comprises the following:

(i) damages based on s. 37(1)(b) of the Copyright Act 1987 in the sum of RM620,000;

(ii) additional damages based on s. 37(7) of the Copyright Act 1987 in the sum of RM50.000; and

(iii) interest of 5% per annum on the aggregate sum of RM670,000 from 14 March 2022 till realisation.

[8] Essentially, the defendant, *vide* their notice of appeal dated 17 December 2024, is appealing against this court's decision. A

Issues

[9] The court is faced with two principal issues:

(i) the appropriate measure of general damages, particularly the applicability of the license fee approach; and B

(ii) the appropriate measure of additional damages, in light of the circumstances of the case.

Counsels' Contentions C

The Plaintiff's Contentions

[10] Learned counsel for the plaintiff, Wendy Lam Mei Kuan, contends that the defendant engaged in unauthorised reproduction and use of the NX12 software, constituting copyright infringement under the Copyright Act 1987 ('the Act'). Counsel argues that the plaintiff, as the rightful owner of the software, is entitled to damages based on the license fee approach, a widely accepted method in copyright infringement cases where the extent of actual use cannot be precisely determined. D

[11] Citing *General Tire & Rubber Co v. Firestone Tyre & Rubber Co* [1976] RPC 197 (HL) and *Redwood Music Ltd v. Chappell & Co Ltd* [1982] RPC 109 (HC), counsel for the plaintiff submits that an infringer should be liable to pay the equivalent of a reasonable license fee, regardless of whether the software was actively used. E

[12] Counsel for the plaintiff further asserts that the defendant's deletion of files before inspection suggests bad faith and deliberate misconduct, justifying an adverse inference against the defendant under the "*omnia praesumuntur contra spoliatorem*" principle. F

[13] Additionally, as directed by the Court of Appeal, the plaintiff seeks additional damages under s. 37(7) of the Act, arguing that the defendant's conduct was flagrant and that it derived a commercial benefit from the infringement. The cases of *Ravenscroft v. Herbert & New English Library* [1980] RPC 193 (HC) and *Kohwai & Young Publication (M) Sdn Bhd v. Lembaga Pengelola Dewan Bahasa Dan Pustaka* [2013] 10 CLJ 365; [2008] 4 MLJ 281 are relied upon to establish that additional damages may be awarded where an infringer's conduct is deliberate, reckless, or demonstrates a blatant disregard for copyright law. The plaintiff submits that the defendant's claim of non-utilisation is unsubstantiated and that its failure to maintain proper software compliance measures further supports the claim for enhanced damages. G H I

[14] In light of these contentions, learned counsel for the plaintiff urges the court to award RM767,290 in license fees, RM169,333 in service fees, and additional damages in the sum of RM100,000, reflecting the flagrancy of the defendant's conduct and ensuring a deterrent effect against future infringement.

The Defendant's Contentions

[15] Learned counsel for the defendant, Rex Kuan Kai Tat, vigorously opposed the plaintiff's claim, challenging it on several grounds. To buttress this argument, the defendant asserted that the plaintiff has failed to provide direct and conclusive evidence that the NX12 software was actively used for commercial purposes by the defendant.

[16] While acknowledging the presence of the software on the defendant's systems, counsel for the defendant maintains that its installation was unauthorised and carried out by an employee without the knowledge or approval of the company. Counsel contends that mere possession of the software does not necessarily equate to active use or commercial benefit, and thus, the license fee approach relied upon by the plaintiff is speculative and excessive. Citing *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 and *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2013] CLJU 104; [2013] 1 LNS 104, the defendant asserts that a plaintiff seeking damages must strictly prove its losses, and courts should not grant damages based on conjecture.

[17] Further, the defendant's counsel submit that the alleged deletion of files should not be construed as an attempt to conceal wrongdoing but rather as part of routine data management. They emphasise that the defendant took corrective steps, including warning the employee responsible and implementing compliance measures to prevent future occurrences. They argue that these actions demonstrate a lack of flagrancy, which is a key requirement for additional damages under s. 37(7) of the Act.

[18] Further, learned counsel for the defendant contends that the plaintiff has not established deliberate or reckless infringement, nor has it shown that the defendant derived significant financial benefit from the software's presence. The case of *Megnaway Enterprise Sdn Bhd v. Soon Lian Hock (No 2)* [2009] 8 CLJ 130 is relied upon to argue that additional damages should only be awarded where infringement is wilful and egregious, which is not the case here. Counsel urges the court to take into account the defendant's good faith efforts in addressing the matter and to reduce or dismiss any award of additional damages.

[19] In conclusion, learned counsel for the defendant submits that any damages awarded should be nominal and proportionate to the actual harm suffered by the plaintiff. They argue that the plaintiff's claim is grossly inflated and unsupported by clear evidence, urging the court to exercise caution in assessing the quantum of damages to prevent an unfair windfall for the plaintiff.

Court's Findings

Issue 1: The Appropriate Measure Of General Damages

[20] It is a well-established legal principle that the assessment of damages follows one of two approaches: either by calculating the profits earned by the infringing party or by awarding compensation commensurate with the financial loss suffered by the plaintiff (see *Dormeuil Freres SA & Anor v. Feraglow Ltd & Anor* [1990] RPC 449 (HL)). In the context of copyright infringement, s. 37(1) of the Act explicitly provides:

> **Action by owner of copyright and relief**
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> 37. (1) Infringements of copyrights and the prohibited acts under sections 36A and 36B shall be actionable at the suit of the owner of the copyright and, in any action for such an infringement or prohibited act, the court may grant the following types of relief:
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> (a) an order for injunction;
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> (b) **damages**;
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> (c) **an account of profits**;
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> (d) **statutory damages** of not more than twenty-five thousand ringgit for each work, but not more than five hundred thousand ringgit in the aggregate; or
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> (e) any other order as the court deems fit.
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> (emphasis added)

[21] Pursuant to s. 37(4) of the Copyright Act 1987, the remedies outlined in s. 37(1)(b), (c), and (d) of the Act are mutually exclusive. Consequently, a copyright owner must elect one form of relief-be it damages, an account of profits, or statutory damages-as granting multiple remedies would result in double recovery.

[22] In the case of *Spalding (A G) & Bros v. AW Gamage Ltd And Benetfink & Co Ltd* [1915] 32 RPC 273 (HL), the plaintiff is entitled to "such damages as naturally flow from their unlawful act, and that there is no artificial limitation in the case of a passing off action" (per Lord Parker of Waddington). It cannot also be presumed that the amount of goods sold by the defendant would have been sold by the plaintiff if not for the defendant's unlawful acts (see: *Leather Cloth Company v. Hirschfield* (1865) LR 1 Eq 299 (Court of Chancery)). Speculative and unproven damage are also excluded

(see: *The United Horse-Shoe And Nail Co Ltd v. John Stewart And Co* (1888) 5 RPC 260 (Court of Chancery); & *Pneumatic Tyre Co Ltd v. Puncture Proof Pneumatic Tyre Co Ltd* (1899) 16 RPC 209 (HC)).

[23] In *General Tire And Rubber Co v. Firestone Tyre And Rubber Co Ltd* (*supra*), it was held that the burden is on the plaintiff to prove the loss actually sustained by reason of the defendant's conduct. Damages for the infringement of intellectual property rights are tortious in nature; with the objective to restore the plaintiff to the position he would have been in had the defendant not infringed. Lord Wilberforce in *General Tire* (at pp. 824-826) laid down as follows:

(i) if the plaintiff exploits the patent by manufacturing and selling goods at a profit and the effect of the infringement has been to divert sales to the defendant, the "measure of damages will ... normally be the profit which would have been realised by the owner of the patent if the sales had been made by him";

(ii) if the plaintiff commercialises their rights *via* royalty-bearing licenses, "the measure of damages (the defendant) must pay will be the sums which he would have paid by way of royalty if, instead of acting illegally, he had acted legally"; and

(iii) in scenarios where neither a normative profit margin nor an established licensing regime exists, damages must be calibrated to reflect a hypothetically negotiated royalty rate-a sum a willing licensor and licensee would reasonably agree upon for the infringing acts.

[24] In the matter at hand, the court concurs with the plaintiff's contention that, having demonstrated a consistent practice of licensing their intellectual property, the circumstances of this case necessitate the application of the second limb articulated in general tire. Accordingly, the appropriate measure of damages must be ascertained by reference to the licensing fees customarily levied by the plaintiff in lawful commercial engagements. This methodology not only adheres to the principles of restorative justice articulated by Lord Wilberforce but also grounds compensation in the tangible framework of the plaintiff's established licensing practices, ensuring that restitution is both equitable and reflective of market realities. By anchoring the award to the plaintiff's standard licensing terms, the court harmonises legal remedy with commercial pragmatism, thereby upholding the integrity of intellectual property rights while mirroring the economic transactions that would reasonably have ensued absent the defendant's infringement.

[25] What, then, is the licensing fees customarily levied by the plaintiff in such circumstances? The evidence establishes that the plaintiff's NX12 software comprises 381 distinct modules, widely deployed in engineering design, simulation, and manufacturing-functions integral to sectors such as

automotive and industrial production. It is uncontested that the defendant, utilised an unauthorised version of NX12. The plaintiff asserts that this illicit access extended to the software's full suite, positing that a lawful license for all modules, coupled with a one-year maintenance package, would amount to RM24,518,425.12 and RM5,312,934, respectively.

[26] However, the defendant's business – specialising in protective coatings for mechanical components to enhance durability and reduce wear – must guide this analysis. The defendant, a subsidiary of Serba Dinamik Holdings Berhad, argued vigorously that its operations focus solely on surface treatments for industrial machinery, not engineering design, simulation, or manufacturing processes necessitating advanced CAD/CAM/CAE tools like NX12. It maintained that the software's alleged use was either incidental or unauthorised, asserting that its core business demands neither the sophistication nor the breadth of functionalities inherent to NX12.

[27] The plaintiff, while advancing its claim for the full licensing value, pragmatically conceded that the defendant's industry-specific activities likely necessitated only a subset of modules. It proposed a reduced license fee of RM767,290 and RM169,333 for maintenance, ostensibly tailored to the defendant's operational profile (see para. 5 of encl. 73). This court has scrutinised the CD-ROM containing the plaintiff's price book for Malaysia, which delineates modular pricing for NX12, and acknowledges its utility as a benchmark (see exh. NYY-2 of encl. 73). Nevertheless, the defendant's corporate affiliation with the Serba Dinamik Group – an international conglomerate engaged in engineering solutions and technical services for the oil and gas industry-introduces complexity. The plaintiff contended that this relationship afforded the defendant access and utility to sophisticated software, while the defendant retorted that its role within the corporate structure remained confined to coatings, detached from engineering processes requiring NX12's capabilities.

[28] This court recognises the licensing fee methodology as a principled mechanism for quantifying damages in copyright disputes, particularly where direct evidence of use is elusive. Yet, two countervailing considerations loom large. First, the plaintiff's claim presupposes comprehensive deployment of NX12's modules without substantiating the defendant's actual utilisation – a burden that, while resting on the plaintiff, encounters evidentiary gaps. Second, the defendant's insistence on non-reliance – rooted in its narrowly defined business of protective coatings-lacks compelling evidentiary support, as it failed to rebut the *prima facie* evidence of infringement.

[29] The court is thus tasked with navigating between the Scylla of speculative overcompensation and the Charybdis of undervaluation. While the plaintiff's affiliation argument carries intuitive weight, the defendant's

specialised role – divorced from engineering design – militates against uncritical adoption of the full licensing sum. Conversely, to dismiss the claim entirely would trivialise the infringement and its commercial implications.

[30] Striking this balance, the court awards a conservatively apportioned sum of RM500,000 as a reasonable license fee and RM120,000 for service costs. This reflects a judicial estimation of probable but limited use, calibrated to the defendant's industry niche and the evidentiary equipoise. Such an award honors proportionality: it neither penalises the defendant for hypothetical maximal use nor absolves it of accountability for unauthorised access. In so ruling, the court reaffirms that damages must harmonise restorative justice with the pragmatic contours of a defendant's business, ensuring fairness to both parties while safeguarding intellectual property rights from erosion.

Issue 2: The Appropriate Measure of Additional Damages

[31] In its judgment, the Court of Appeal has directed this court not only to assess damages under s. 37(1)(b), but also to assess damages under s. 37(7). This would mean that it is in the Court of Appeal's view that the plaintiff is not limited to just compensation but can also seek punishment for the defendant's misconduct. The ruling recognises that pure financial compensation is insufficient to address the harm caused by such infringement, wherein this court must carefully assess financial evidence while also considering deterrence and fairness.

[32] Section 37(7) of the Act provides as follows:

> (7) Where in an action under this section an infringement of copyright or the commission of a prohibited act under section 36A or 36B is established, the court may, in assessing damages for the infringement or commission of the prohibited act, award such additional damages as it may consider appropriate in the circumstances if it is satisfied that it is proper to do so having regard to:
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> (a) the **flagrancy of the infringement** or prohibited act;
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> (b) **any benefit shown to have accrued to the defendant** by reason of the infringement or prohibited act; and
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> (c) all other relevant matters.
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> (emphasis added)

[33] The defendant argued that additional damages were unwarranted, as the infringement was neither deliberate nor commercially exploited to the extent suggested by the plaintiff. Furthermore, the defendant contended that it had taken immediate corrective actions upon discovering the infringement, including:

(i) issuing formal warnings to the employee responsible for the unauthorised installation;

(ii) implementing internal compliance measures to prevent future copyright breaches, including strengthening IT governance policies; and

(iii) removing all infringing copies of the software from its systems once notified of the infringement.

[34] While the defendant has sought to characterise its remedial measures as evidence of good faith, the court cannot ignore the troubling implications of its conduct, particularly the deletion of files prior to forensic inspection. Such actions inevitably give rise to concerns of bad faith, casting doubt on the defendant's assertion of mere oversight. The unauthorised use of the plaintiff's software constitutes a grave lapse in governance, made all the more significant given the defendant's industry and the highly specialised nature of the NX12 software.

[35] Applying the principles articulated in *Ravenscroft v. Herbert & New English Library* (*supra*) and *Kohwai & Young Publication (M) Sdn Bhd v. Lembaga Pengelola Dewan Bahasa dan Pustaka* (*supra*), the court is satisfied that additional damages under s. 37(7) of the Act are warranted, both as a punitive measure and as a deterrent against similar future infringements. However, the defendant's subsequent remedial efforts, while not wholly exculpatory, warrant consideration in assessing the appropriate quantum. The presence of bad faith elements precludes a complete absolution of liability, but the defendant's corrective steps must nonetheless be acknowledged in a fair and measured manner.

[36] It is particularly noteworthy that the defendant, as part of the Serba Dinamik Group, possessed the financial capability to lawfully procure the NX12 software but instead chose to utilise an illicitly obtained version. This decision betrays a deliberate disregard for copyright laws, further justifying the imposition of additional damages. In balancing these considerations, the court finds it appropriate to impose a financial sanction sufficient to deter future violations while duly reflecting the extent of the infringement-which, in this instance, was confined to a single laptop computer. Accordingly, the court awards RM50,000 in additional damages, striking a careful equilibrium between the need for deterrence and the defendant's mitigating actions.

Decision

[37] Taking all these matters into careful consideration, I have ordered that the defendant shall pay the plaintiff the sum of RM670,000 in damages, together with interest at the rate of 5% from 14 March 2022 until full realisation, and assessment costs amounting to RM4,000.